Calendar No. 261

101ST CONGRESS *1st Session*	SENATE	REPORT 101-141

FAIRNESS IN BROADCASTING ACT OF 1989

Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

OF THE

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 577

SEPTEMBER 26 (legislative day, SEPTEMBER 18), 1989.—Ordered to be printed

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SEPTEMBER 26, (legislative day, SEPTEMBER 18), 1989.—Ordered to be printed

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REPORT

[To accompany S. 577]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 577) to clarify the congressional intent concerning, and to codify, certain requirements of the Communications Act of 1934 that ensure that broadcasters afford reasonable opportunity for the discussion of conflicting views on issues of public importance, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill do pass.

PURPOSE OF THE BILL

The purpose of the bill (S. 577) is to amend the Communications Act of 1934 to clarify the Congressional intent concerning and to codify certain requirements of the Communications Act of 1934 to ensure that broadcasters afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

BACKGROUND AND NEEDS

OVERVIEW

The Fairness Doctrine, adopted in 1949 by the Federal Communications Commission (FCC), requires broadcasters (1) to cover issues of public importance and (2) to reflect fairly differing viewpoints on those issues. The Fairness Doctrine does not require that broadcasters provide every side of an issue with the exact amount of time in precisely the same time period. Instead, broadcasters simply must

ensure that their programming taken as a whole presents issues of public importance and does so in a balanced fashion.

In recent years, the FCC has attempted to eliminate the Fairness Doctrine. In September 1981, the FCC recommended to Congress that the Doctrine be repealed. FCC News Release, Report No. 5068, September 17, 1981. Almost three years later, the FCC instituted a proceeding to examine the rationale for the Doctrine and its effects. Notice of Inquiry, 49 FR 20317 (May 14, 1984). The resulting Report concluded that the Doctrine should be repealed because it did not significantly further free speech and it chilled the speech of broadcasters. 102 FCC 2d 145 (1985). The FCC, however, continued to believe that the Congress had codified the Fairness Doctrine in 1959 when it amended section 315 of the Communications Act and, consequently, did not repeal it. The FCC continued to express to Congress that it believed the Congress had to make the decision to repeal the Doctrine. A petition to review the Report was immediately filed in the U.S. Court of Appeals by the Radio-Television News Directors Association. *Radio-Television News Directors Association* v. *FCC*, 809 F.2d 860 (D.C. Cir. 1987), vacated, 831 F.2d 1148 (1987).

During the pendency of this appeal, the Congress reviewed the Report. It determined that the FCC's inquiry was deficient and directed the FCC to report, by the end of fiscal year 1987, whether there were alternative means of administering and enforcing the Doctrine which would lessen any costs and increase the benefits. Pub. L. No. 99-500 (October 18, 1986). The Congress also expressed, in the report accompanying this legislation, that Congress supported the Fairness Doctrine and that it should not be repealed.

In September 1986, the U.S. Court of Appeals, in holding that the Fairness Doctrine does not apply to the teletext service, also held that the Doctrine was not a statutory requirement. *Telecommunications Research and Action Center* v. *FCC*, 801 F.2d 501 (D.C. Cir. 1986) (TRAC), cert. denied 482 U.S. 419 (1987). The court concluded that Congress merely ratified the Doctrine in making its 1959 amendments to section 315(a) of the Communications Act and that the Doctrine stems from the general public interest standard in the Act. The Committee believes the Court of Appeals decision wrongly interpreted the 1959 amendments and that the Congress explicitly placed the Fairness Doctrine in the Communications Act at this time. Clearly this court decision necessitates that the reported bill proceed, to ensure that the Doctrine is codified in that Act.

Meanwhile, the FCC did not begin the study required by Congress until February 19, 1987, four months after the law was signed. FCC MM Docket No. 87-26. While the Congressionally-mandated study request was pending, the FCC instituted a proceeding (Order, FCC No. 87-33, released January 23, 1987) to eliminate the Fairness Doctrine, asserting that its action was mandated by the decision in *Meredith Corporation* v. *FCC*, 809 F.2d 863 (D.C. Cir. 1987), remanding the case to the FCC for consideration of the constitutional issue. However, the *Meredith* case had not been finally decided at the time the FCC began this proceeding. Thereafter, however, on March 31, 1987, the court denied the request for rehearing.

Since 1983, when Mark Fowler was FCC Chairman, the FCC was consistently sought to abolish the Fairness Doctrine, despite continuously voiced Congressional support for the Doctrine. With the decision in the *TRAC* case permitting the FCC to repeal the Doctrine and the Court's admonitions in the *Meridith* case that the FCC must follow legal—not political—requirements, the FCC believed it sufficiently free to achieve its longstanding objective. On August 7, 1987, the same day the FCC released its report in Docket 87-26, the FCC repealed the Fairness Doctrine. Syracuse Peace Council, Memorandum Opinion and Order, 2 FCC Rcd. 5043 (1987) (*Syracuse*), aff'd, 867 F.2d 654 (D.C. Cir. 1989). The decision was affirmed by the D.C. Circuit, but the Court did not rule on the constitutionality of the Fairness Doctrine. Id. at 657. The court only held that the FCC's action was not arbitrary and capricious. Id. at 669. This FCC action necessitated the reported bill.

From the enactment of the Federal Radio Act in 1927, the premise underlying regulation of broadcasters has been that the limited number of broadcasters have special obligations and should operate as public trustees because they use a scarce valuable public resource, the electromagnetic spectrum. Few can own and operate broadcast stations, relative to the demand for such stations. Therefore, it is necessary to ensure that those who are not broadcasters can speak on important public issues and that the public receives a wide variety of views on these matters. In this regard, the Fairness Doctrine was seen as a way of enhancing speech and furthering First Amendment principles.

The FCC concluded, however, in the 1987 *Meredith* case that the original reasons for the Fairness Doctrine no longer exist and that, in any event, the Doctrine never enhanced speech of the public. Specifically, it argued that: (1) there are significantly more radio and television stations today than in 1949; (2) the spectrum is no longer scarce because of technological developments and new services; and (3) the Doctrine has actually inhibited speech since broadcasters often refrain from airing certain programs or advertisements because they would have to permit others to respond.

The Committee has considered the FCC's arguments and strongly believes that the realities of the broadcasting service clearly demonstrate that the original premises for the Fairness Doctrine remain: (1) a valuable public resource, the electromagnetic spectrum, remains scarce; (2) broadcast channels are limited, despite the introduction of new video and audio services; (3) Congress in the Communications Act has chosen a system where a select few are licensed to utilize the broadcast spectrum in exchange for a commitment to operate in the public interest as public trustees; (4) the Doctrine has permitted those who do not own broadcast stations to have an opportunity to participate in important public debate and has provided the public with a greater range of views upon which to make informed decisions; and (5) the Doctrine is no more than good journalistic practice that does not chill the speech of broadcasters.

Likewise, the Committee has considered and rejected the arguments made in the FCC's 1987 report on alternatives to the Fairness Doctrine. The Committee disagrees with the FCC's conclusion that outright repeal of the Doctrine "best serves our public interest

objectives." Inquiry into Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees, FCC 87-264 (released August 4, 1987), at para. 32. The FCC's analysis of alternatives—like its analysis of the Fairness Doctrine itself—erroneously assumes that the "free marketplace of ideas" is achieved only through deregulation. See id. The FCC's argument ignores the realities and the failures of the marketplace, and omits any consideration of the responsibilities of broadcasters as trustees of a valuable public resource. Having now reviewed the current state of the broadcasting industry, the marketplace, and the continuing need for an appropriate means of vindicating the public's right to diverse and antagonistic sources of information, the Committee concludes that the Fairness Doctrine remains a necessary and constitutionally permissible part of broadcast regulation.

In sum, the Committee believes that the court and the FCC incorrectly concluded that the Fairness Doctrine was not codified by Congress, and that the FCC did not have the authority to eliminate the Fairness Doctrine. In addition, the Committee believes that the Doctrine is essential to ensure the discussion of controversial issues and ensure the public access to stations to present opposing viewpoints on those controversial issues. Accordingly, it is appropriate for the courts and the FCC to apply the Fairness Doctrine to any pending cases, and the reported bill will ensure the continuation of this Doctrine as the law.

THE FAIRNESS DOCTRINE

The Fairness Doctrine requires broadcast licensees to afford reasonable opportunities for the discussion of conflicting views on issues of public importance. In effect, the Doctrine has two prongs: it requires broadcasters (1) to cover issues of public importance and (2) to present these issues fairly. This does not mean that when a licensee presents one side of a controversial issue he is required to provide a forum for opposing views on that same program or series of programs. He is only expected to make a provision for the opposing views in his overall programming. "Further there is no requirement that any precisely equal balance of views be achieved, and that all matters concerning the particular opposing views be presented, and the appropriate spokesman and format for their presentation are left to the licensee's discretion subject only to a standard of reasonableness and good faith." Fairness Report, 48 FCC 2d 1, 18 (1974) ("1974 Fairness Report").

In determining whether there has been a violation of the Fairness Doctrine, the FCC does not monitor broadcasts. The FCC only acts if it (1) receives a complaint and (2) determines that the complaint presents *prima facie* evidence of a violation. Moreover, in order for the FCC even to consider a complaint, it must have the following information:

1. The particular station involved;
2. The particular issue of a controversial nature that was discussed over the air;
3. The date and time when the program was carried;
4. The basis for the claim that the station has presented only one side of the question; and

5. Whether the station has afforded, or plans to afford, an opportunity for the presentation of contrasting viewpoints.

"Fairness Doctrine Primer, 40 FCC 598, 600 (1964). Under this standard, it is not enough for a complainant to assert that he viewed a program which presented only one side of the issue. He must also demonstrate that, in its other programming, the station has not presented contrasting views on the issue. This does not mean that the complainant must listen to or view the station 24 hours a day 7 days a week, but only that the complainant demonstrate that he has viewed or listened to the evening news and a significant portion of the public affairs programming. 1974 Fairness Report, 48 FCC 2d at 19.

In responding to a complaint forwarded by the FCC, "the station is not required to research everything it broadcasts on the subject over a considerable period of time." 48 FCC at 20. If the complaint specifies a single program, then it would be sufficient for the licensee to show that it broadcast another program "which did afford a reasonable opportunity for contrasting views." *Id.* The Fairness Doctrine does not require "exact equality in time provided" for contrasting viewpoint, only that "a reasonable opportunity be afforded to their presentation." 48 FCC 2d at 20.

To put this information into perspective, it is helpful to consider the following statistics. In fiscal year 1974, the FCC received 2,400 Fairness Doctrine complaints, but only 94 of those complaints were forwarded to the licensee for their comments. See 1974 Fairness Report, 48 FCC 2d at 8. In recent years, although the number of complaints has grown, the number of inquiries to licensees has dropped.

	Complaints filed	Complaints forwarded to licensee
Year:		
1984	6,760	Approximately 6.
1985	7,296	Do.
1986	5,509	Do.

See, Letter to Senator Inouye from Chairman Mark Fowler, March 20, 1987.

During the six years that Mark Fowler was Chairman of the FCC, only one Fairness Doctrine complaint resulted in litigation. See, *Meredith Corp.* v. *FCC*, supra. In reality, there are very few instances where Fairness Doctrine complaints result in any action by the FCC or the courts. Of the witnesses who testified at the Fairness Doctrine Committee hearing on March 18, 1987, and who presently own or are employed by broadcast stations, none had ever been asked by the FCC to respond to a complaint. No evidence was presented to the contrary at the March 15, 1989 hearings.

Seventeen years ago, the Supreme Court unanimously upheld the Fairness Doctrine against First Amendment challenge in *Red Lion Broadcasting Co.* v. *FCC, (Red Lion)* 395 U.S. 367 (1969). The Court held, that in the context of broadcasting, the rights of the viewing public to hear contrasting viewpoints on issues of public importance, not the rights of broadcasters, were paramount. It held that the Fairness Doctrine was both a permissible and effective means

of vindicating those rights. The fact that far more people were willing and able to engage in broadcasting than could possibly be accommodated by the limited spectrum available, the court found, justified a regulatory scheme that required those granted licenses to serve as fiduciaries or trustees and obligated them to present the views of those otherwise excluded from the airways.

The factual predicate of scarcity—a greater number of individuals wishing to broadcast than available frequencies—remains present today. Thus, *Red Lion's* conclusion that the Fairness Doctrine is constitutional remains valid. In addition, the Fairness Doctrine is a reasonable condition on the use of a valuable public resource, the spectrum. These conclusions are reinforced by an examination of the history of the Fairness Doctrine and an analysis of how the doctrine functions in practice. This examination further reveals that the doctrine serves to increase speech on issues of public importance.

HISTORY OF THE FAIRNESS DOCTRINE

Red Lion was not the beginning of the principle that broadcasters, who receive a valuable public resource, are required as a consequence to act as public trustees and to present diverse viewpoints on important issues. This concept was, and is, at the core of the public interest standard of the Communications Act.

The early experience with radio showed that, with unfettered competition for use of the airwaves, no one could effectively broadcast. Instead, all were drowned out. The Navy reported to the U.S. Senate that: "[C]alls of distress from vessels imperiled on the sea go unheeded or are drowned out in the etheric bedlam produced by numerous stations all trying to compete at once. * * * It is not putting the case too strongly to state that the situation is intolerable, and is continually growing worse." S. Rept. No. 659, 61st Cong. 2d Sess. at 4 (1910). See also E. Krasnow, L. Longley, and O. Terry, The Politics of Broadcast Regulation 10–16 (3d. Ed. 1982). As a result, the broadcasting industry demanded government allocation of the spectrum. Herbert Hoover commented in 1924 that he thought broadcasting was "probably the only industry of the United States that is unanimously in favor of having itself regulated." Quoted in G. Head, Broadcasting in America: A Survey of Television and Radio 126 (3d. Ed. 1976). In response to this request, Congress provided for Federal regulation of broadcasting and required that licenses be granted on the basis of the "public interest".[1]

In one of the first actions under the public interest standard, the Federal Radio Commission (FRC), predecessor of the FCC, held that

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[1] The requirement that broadcasters be regulated in the "public interest, convenience and necessity" was included in the original statute affecting broadcasting, the Radio Act of 1927. Herbert Hoover, in 1924, argued that broadcasters should be public trustees:

> Radio Communications is not to be considered as merely a business carried on for private gain, for private advertisement, or for entertainment of the curious. It is a public concern impressed with the public trust and is to be considered primarily from the standpoint of public interest to the same extent and upon the basis of the same general principles as our other public utilities.

Hearings on H.R. 7357 Before the House Committee on Merchant Marine and Fisheries, 68th Congress, 1st Session, 10 (1924).

the right to free expression did not extend to the broadcast of private issues. In the matter of WRAK in Erie, Pennsylvania, the station's owner and another licensee were engaged in personal controversy, using their broadcast facilities for abusive exchanges against each other. The FRC stated that it "is not attempting to pass on the responsibility for dispute. * * * The Commission, however, is certain that whoever may be to blame, it is not in the public interest, convenience or necessity to permit these two broadcasters further to regale the inhabitants of Erie with their personal differences". 1927 FRC Annual Report, p. 159.

Later in 1928, the FRC expanded its prohibition against the use of stations for private purposes in the matter of WCOT. There the FRC prohibited the use of a station "chiefly for the purpose of serving the private interests of the applicant and as a conveyance for his personal views." Although no mention is made of presenting opposing views, it was implicit in the decision that this was not done and that lack of balance "invoked the Commission's ire." Id. at 152.

Later that same year, the FRC articulated in the WEVD case what was clearly the infant Fairness Doctrine. Id. at 154. The FRC stated that in broadcasting political or religious themes, a station "must be conducted with due regard for the opinions of others".

Clearly these cases, WRAK, WCOT, and WEVD, are the root of the FRC's "Principles Underlying the Evaluation of Broadcast Stations," which were first announced in *Great Lakes Broadcasting Co.*, 3 FRC Ann. Re. 32,34 (1929), rev'd on other grounds, 37 F. 2d 993 (D.C. Cir.), *cert. dismissed*, 281 U.S. 706 (1930):

> Broadcasting stations are licensed to serve the public and not for the purpose of furthering the private or selfish interest of individuals or groups of individuals. The standard of public interest, convenience, or necessity means nothing if it does not mean this * * * In such a scheme there is no room for the operation of broadcasting stations exclusively by, or in the private interests of, individuals or groups so far as the nature of the program is concerned * * * Insofar as a program consists of discussion of public questions, public interests require ample play for the free and fair competition of opposing views and the Commission believes that the principle applies * * * to all discussions of issues of importance to the public.

The phrase "due regard for the opinion of others" from WEVD evolved in *Great Lakes* to an affirmative responsibility strikingly similar in language to the present day "Fairness Doctrine".

Thus followed a spate of license revocations for what essentially were fairness and personal use violations. Among those revocations were the notorious Brinkley and Shuler cases.

Dr. John R. Brinkley, operator of KFBK, used his broadcast facility as an integral part of two other ventures, his Brinkley Hospital and Brinkley Pharamaceutical Association. For three 30-minute broadcasts each day, the doctor appeared personally over the station. During those programs, he would read letters mailed by listeners describing their various physical ailments and, without any personal examination, prescribe remedies for those ailments. Those remedies invariably entailed prescription of Dr. Brinkley's special

concoctions, designated by number and available at participating pharmacies. In turn, member druggists remitted a fixed percentage of their gross sales of Brinkley tonics to KFBK in lieu of a fixed charge for the doctor's broadcast time. By far the greatest volume of the station's annual income was derived from those royalties and advertisements for Brinkley Hospital.

Due to the number of complaints the broadcasts generated, the station's application for license renewal was set for hearing. The FRC determined that renewal of the license was not in the public interest, convenience, or necessity. It found that the practice of prescribing medical treatment over the air without physical examination was inimical to the public interest and that Dr. Brinkley had operated the station for his own private purposes. Dr. Brinkley appealed the FRC's ruling to the U.S. Court of Appeals for the District of Columbia. *KFBK Broadcasting Association, Inc.* v. *FRC*, 47 F. 670 (D.C. Cir. 1931).

In upholding the FRC's action, the court determined that the business of broadcasting, as a species of interstate commerce, is subject to reasonable regulation by Congress and its arm, the FRC. The court then reasoned:

> When Congress provided that the question whether the license should be issued or renewed should be dependent upon a finding of public interest, convenience or necessity, it very evidently has in mind that broadcasting should not be a mere adjunct of a particular business, but should be of a public character. Obviously there is no room in the broadcast band for every business or school of thought. For the first time, the Court of Appeals agreed that a broadcast license could not be used for a private purpose.

Id. at 672.

The Shuler case involved the renewal of KGEF's license. Trinity Methodist Church was the nominal licensee. However, KGEF was actually operated and controlled by Robert P. Shuler, the church's pastor. He was the principal spokesman over the station, frequently taking positions on controversial issues of a public nature and launching personal attacks upon public officials, the courts, and other individuals and groups. He often severely criticized the Catholic Church and disparaged Jews. Moreover, his allegations and disparagements frequently had no basis in fact.

After a hearing, the FRC decided not to renew the license, and stated:

> The Commission holds no brief for any parties subjected to attacks through the medium of station KGEF, but in almost every instance appearing on the record the attacks made by Shuler, and the methods employed therefor, are certainly not in the interests of the public or the rendition of a commendable broadcasting service. The broadcasts of this party are filled with misstatements of fact and insinuations based thereon. * * * Surely, the case, in such a manner, of one of the most powerful mediums of furnishing instruction and entertainment to the public does not meet the statutory standard upon which the right to hold

> a license must be based. *While the Commission does not have the power of censorship, it does have the duty of determining whether the standard fixed by law has been or will be met by the use of a broadcast license.* (Italics supplied.)

Trinity Methodist Church, South v. *FRC*, 62 F. 850 (D.C. Cir.) cert. denied, 284 U.S. 685 (1932). Thus, in addressing broadcasts that involved personal attacks and in concluding that such attacks were not in the public interest, the FRC developed a new standard for dealing with broadcast content. It condemned broadcasts "filled with misstatements of fact and insinuations based thereon." *Supra.* The broadcast of opinion per se was not condemned, only opinion based upon misstatement of fact.

The U.S. Court of Appeals for the District of Columbia, upholding the FRC's action, said:

> If it is considered that one in possession of a permit to broadcast in interstate commerce may, without let or hindrance from any source, use these facilities, reaching out, as they do, from one corner of the country to the other, to obstruct the administration of justice, offend the religious susceptibilities of thousands, inspire political distrust and civic discord, or offend youth and innocence by the free use of words suggestive of sexual immorality, and be answerable for slander only at the instance of the one offended, then this great science, instead of a boon, will become a scourge, and the Nation a theater for the display of individual passions and the collisions of personal interests. This is neither censorship nor previous restraint, nor is it a whittling away of the rights guaranteed by the first amendment, or an impairment of their free exercise. Appellant may continue to indulge his structures upon the characters of men in public office. He may just as freely as ever criticize religious practices of which he does not approve. He may even indulge private malice or personal slander—subject, of course, to be required to answer for the abuse thereof—but he may not, as we think, demand, of right, the continued use of an instrumentality of commerce for those purposes, or any other, except in subordination to all reasonable rules and regulations Congress, acting through the Commission, may prescribe.

Id.

In 1938, the FCC reached another level in its development of the Fairness Doctrine. The FCC denied the application of Young Peoples Association for the Propagation of the Gospel for a construction permit because of an association policy not to permit the use of its facilities by persons or organizations whose views differed from those of the applicant. Young Peoples Association for the Propagation of the Gospel, 6 FCC 178 (1938). The FCC reasoned:

> The facilities of the station are to be used primarily for the dissemination of religious programs to advance the fundamentalist interpretation of the Bible. The applicant stated, however, that in connection with religious broadcasts the station's facilities would be extended only to

> those whose tenets and beliefs in the interpretation of the Bible coincide with those of the applicant * * * Where the facilities of a station are devoted primarily to one purpose and the station serves as a mouthpiece for a definite group or organization, it cannot be said to be serving the general public. That being the case, if one group or organization is entitled to a station facility for the dissemination of its principles, then other associations of equal magnitude would be entitled to station licenses on the same grounds.

Id. at 181. The applicant's refusal to broadcast various points of view is the singular reason given for denying the permit. Obviously, the "Fairness Doctrine" in at least skeletal form was very much alive in 1938 as before.

In 1941, the Commission issued its so-called *Mayflower* decision. *Mayflower Broadcasting Corp.*, 8 FCC 333 (1940). The Yankee Network, Inc. was the licensee of two stations, WAAB and WNAC, Boston Massachusetts. Starting early in 1937, both stations adopted a policy of broadcasting licensee editorials. Through that vehicle, station management advocated election of various political candidates and took positions upon a number of controversial public issues.

On March 31, 1938, Lawrence J. Flynn, a former employee of the Yankee Network, Inc., forwarded a petition to the FCC requesting a hearing upon the renewal application of WAAB. He based his criticism of the station upon the editorial practices of management. Supporting his argument, he accompanied his petition with recordings of editorials and political speeches allegedly delivered by an employee of the licensee over both stations WAAB and WNAC. Flynn later withdrew his petition and the evidence upon which it was based.

On March 23, 1939, Mayflower Broadcasting Corp. filed application for construction of a new broadcasting station in Boston and requested for it the frequency being used by WAAB. One of the three shareholders of Mayflower was Lawrence J. Flynn. The Mayflower application and the WAAB renewal application were designated for hearing. On January 17, 1941, the final order of the FCC was issued with the following phrase: "In brief, the broadcaster cannot be an advocate." Id. at 339.

In the proposed findings and conclusions, Mayflower's application for a construction permit was denied. However, in renewing WAAB's license, the FCC also addressed the matter of editorial practices. The FCC said:

> No attempt will be made here to analyze in detail the large number of broadcasts devoted to editorials. The material in the record has been carefully considered and compels the conclusion that this licensee, during the period in question, has revealed a serious misconception of its duties and functions under the law. Under the American system of broadcasting it is clear that responsibility for the conduct of a broadcast station must rest with the broadcaster. It is equally clear that with the limitations on the frequencies inherent in the nature of radio, the public interest can never be served by a dedication of any broadcast facility to

> the support of his own partisan ends. Radio can only serve as an instrument of democracy when devoted to the communication and the exchange of ideas fairly and objectively presented. A truly free radio cannot be used to advocate the causes of the licensee. It cannot be used to support the candidates of his friends. It cannot be devoted to the support of principals he happens to regard most favorably. In brief, the broadcaster cannot be an advocate.

Id.

Whatever the positions that were argued, the decision was widely interpreted as a flat prohibition against licensee editorializing of any sort. The basis for the conclusion that the FCC forbade licensee editorials is the FCC's statement that: "Relying upon these comprehensive and unequivocal representations [not to editorialize] and in view of the loss of service to the public involved in the deletion of the station, it has been determined to grant the application for renewal." *Id* at 340. This interpretation prevailed until 1949.

Mayflower did not abolish the public interest requirement that broadcasters carry controversial public issues in their other broadcast content. In *Mayflower* the FCC stated: "Freedom of speech must be broad enough to provide full and equal opportunity for the presentation of all sides of public issues * * * fairly, objectively and without bias." *Id.*

Within a year, the FCC, apparently realizing the difficulties with its position, relented from the hard implications of *Mayflower*. In its 1941 Seventh Annual Report at page 28, the FCC stated that: "The public interest—not the private interest—is paramount * * * Freedom of speech on the radio must be broad enough to provide full and equal opportunity for the presentation to the public of all sides of an issue." Noticeably absent from the report was any mention of the prohibition against editorializing. In fact, the FCC intentionally deleted the language restricting licensees' editorials when quoting language from the *Mayflower* decision. After that report and prior to 1949, the FCC addressed licensees' "Fairness" obligations in a number of contexts. See, *WHKC*, 10 FCC 515 (1945) (the public interest is not seved where a station intentionally excludes certain issues of public importance); Public Service Responsibility of Broadcast Licensees, (Report of the FCC, March 7, 1946 (appraising licensees of the renewal procedures and their programming obligations); *United Broadcasting Co.*, 10 FCC 515 (1945) (stations cannot as a general policy refuse to sell time for the discussion of controversial issues).

In its Editorializing Report of 1949, 13 FCC 1246 (1949), the FCC released its most comprehensive discussion to date of licensee "fairness" obligations. The FCC collected and summarized its previous "Fairness" decisions with the noticeable exception of *Mayflower*.

> [T]he individual licensees of radio stations have the responsibility for determining the specific program material to be broadcast over their stations. This choice, however, must be exercised in a manner consistent with the basic policy of Congress that radio be maintained as a medium of free speech for the general public as a whole rather than as an outlet for the purely personal or private inter-

> ests of the licensee. This requires that the licensees devote a reasonable percentage of their broadcasting time to the discussion of public issues of interest in the community served by their stations and that such programs be designed to that the public has a reasonable opportunity to hear differing positions on the public issues of interest and importance in the community. * * * For the licensee is a trustee impressed with the duty of preserving for the public generally radio as a medium of free expression and fair presentation.

Id. at 1256. Thus, the foundation of the modern "Fairness Doctrine" was laid.

In interpreting this Report the FCC stated that "the licensee has an affirmative duty to seek out, aid and encourage the broadcast of opposing viewpoints." *WLIB* 6 RR 258 (1950). However, in the matter of KNOE, the words "seek out" were deleted. See, FCC Letter to KNOE Mimeo 76175.

In 1959, Congress amended section 315 of the Communications Act to add the provision that broadcasters are not relieved "from the obligation imposed upon them under this Act to operate in the public interest and to offer reasonable opportunity for the discussion of conflicting views on issues of public importance." 47 U.S.C. 315(a). In reporting the legislation that was later to include this provision, the Senate Commerce Committee took great care to indicate its intent that the Fairness Doctrine should remain in effect: "In recommending this legislation, the Committee does not diminish or affect in any way Federal Communications Commission policy or existing law which holds that a licensee's statutory obligation to serve the public interest is to include the broad encompassing duty of providing a fair cross section of public affairs and matters of public controversy." S. Rept. 526, 86th Cong., 1st Sess. p. 13 (1959). To ensure this occurred, the full Senate added the Fairness Doctrine language as an amendment. The Conference Committee of the House and Senate described this amendment as "a restatement of the basic policy of the 'standard of fairness' which is imposed on broadcasters under the Communications Act of 1934." H.R. Rept. No. 1069, 86th Cong., 1st Sess. (1959). (For a more detailed history of the development of the Fairness Doctrine, See, S. Rept. No. 100–34, 100th Cong., 1st Sess. Appendix 1)

THE RATIONALE FOR S. 577

1. Overview

The government's oversight of the broadcast industry and the establishment of the Fairness Doctrine rests on four fundamental conclusions:

> (1) A valuable public resource, the electromagnetic spectrum, remains scarce relative to demand; broadcast channels are limited, despite the introduction of new video and audio services;
>
> (2) Congress in the Communications Act has chosen a system where a select few are licensed to utilize the broadcast spectrum in exchange for a commitment to operate in the public interest as public trustees;

(3) The Doctrine has permitted those who do not own broadcast stations to have an opportunity to participate in important public debate, and has provided the public with a greater range of views upon which to make informed decisions; and

(4) The Doctrine is no more than good journalistic practice that does not chill the speech of broadcasters.

Any constitutional analysis of the Fairness Doctrine must take into account that broadcasters are granted a valuable resource to use as public trustees. As such, they have certain obligations that are not imposed on other media of mass communications.

The Supreme Court has repeatedly stated that "differences in the characteristics of news media justify differences in the First Amendment standards applied to them." *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 386 (1969). As Justice Jackson observed, "[t]he moving picture screen, the radio, the newspaper, the handbill, the sound truck, the street corner orator have differing natures, values, abuses and dangers. Each * * * is a law unto itself." *Kovacs* v. *Cooper,* 336 U.S. 77, 97 (1949) (Jackson, J., concurring). As a result, the Court has taken varying approaches when reviewing regulations that affect newspapers,[2] billboards,[3] motion pictures,[4] loudspeakers,[5] and cable television.[6] In the case of broadcasting, the broadcaster's acceptance of the role of public trustee in exchange for the government's grant of a license to broadcast justifies imposition of the Fairness Doctrine to ensure balanced coverage of controversial issues.

Unlike print media, broadcasters must obtain a government license to operate, and that license comes with conditions. In return for the broadcaster's agreement to abide by certain rules, the broadcaster receives certain protections. Broadcasters benefit from exclusive use of a valuable resource that ensures them entry into the viewers' homes. Other forms of communications receive no such benefits.

The American system of broadcasting is unique. At the direction of Congress, the FCC developed a system of broadcasting that depends almost exclusively on a limited number of full power stations. Congress could just as easily have mandated alternative uses of the spectrum for many more broadcast stations (akin to cellular radio, for instance) at lower power. Congress could have also decided that this spectrum could be used for a video programming service provided by common carriers under tariff. Under such a scheme, the licensee would have had no control over content. It is also possible that Congress could have required sharing of broadcast frequencies, as is often done in the private radio field. Finally, Congress could have severely restricted or prohibited renewal of licenses or terms and conditions under which licenses are granted or held.

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[2] *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974) (overturning a State statute requiring a right-of-reply).

[3] *Metromedia, Inc.* v. *City of San Diego,* 453 U.S. 490 (1981).

[4] *Freedman* v. *Maryland,* 380 U.S. 51 (1965) (State censor board screening of motion pictures).

[5] *Saia* v. *New York,* 334 U.S. 558 (1948) (striking down ordinance prohibiting permitless operation of loudspeakers).

[6] *City of Los Angeles* v. *Preferred Communications,* 476 U.S. 488 (1986) (deciding cable TV implicates First Amendment interests, but declining to rule whether a print or broadcast standard was appropriate).

In each of these theoretical examples, there would have been opportunities for a far greater number of people to broadcast, albeit with the likelihood of a much smaller audience. Instead, in passing the Communications Act of 1934 Congress concluded that the public interest would be best served by fewer stations with greater power each under the control of a single licensee. While the opportunity for members of the public to air their views was thereby limited, broadcasters were required by statute to act as trustees for all the public in exchange for the valuable privilege conferred by grant of a broadcast license.

As part of this obligation to serve the public, the Committee believes that broadcasters must adhere to the Fairness Doctrine. The Fairness Doctrine serves as a surrogate for other methods of licensing that would have permitted more people to own stations. In effect, it permits non-owners to become temporary licensees and the public to receive additional views. By codifying the Fairness Doctrine, the Committee intends to preserve this original allocation of rights and responsibilities.

It is indisputable that the government needs to control the electromagnetic spectrum. In the early days of broadcasting when there was no such control, people established stations with little or no regard to their effect on other operators. The result was chaos. It was clear that government oversight was essential to prevent interference and permit the operators and the public to have a clear signal.

The government's oversight of the spectrum not only extends to preventing interference within a service but to allocating spectrum to prevent interference among services. In making these spectrum judgments, the government faces an extraordinarily difficult task. The prime spectrum was the first occupied and is now the most crowded. There are virtually no open bands in the first 1000 MHz of the spectrum, even though many users still want access.

In parcelling out this prime territory, the government's aim has been to ensure that each service was in the best interests of the public. Broadcasting, telephones, safety and rescue services, and business uses have taken precedence. In each instance, the government has estasblished rules for the use of the spectrum concommitant with the type of service offered: public trustee rules for broadcasters; and obligations to service all at tariffed rates for common carriers.

At the March 18, 1987 Committee hearing, Senator Packwood asked whether the Fairness Doctrine should be applied to a newspaper transmitted for publishing via satellite, since the transmission involves use of the spectrum. While this transmission involves spectrum, it is spectrum operated by a common carrier that must permit anyone to have access to it at tariffed rates. The sending of the newspaper is comparable to any telephone conversation, where there are few requirements on the speaker's message and where the licensee has no control of the message's content. It should also be noted that the newspaper being transmitted goes from one point to about ten specifically-designated locations; it is not sent unfettered to the general public. This transmission, in addition, takes little time, freeing the same spectrum for many other users.

There are two other considerations that need to be accounted for in adopting regulations for the use of spectrum in the public interest. First, the regulation must be effective. It should accomplish the purpose for which it was designed. If not, it should be amended or replaced. Second, the regulation should be narrowly tailored so as to impose the minimal burden on the licensee. While this poses problems in a nationwide scheme of spectrum regulation, the government still has a duty to fashion its regulations in conformity with this objective.

The underpinnings for government control of the spectrum are firm. Its rulings have been upheld time and again by the courts. They have proven to be of great use to the public. The question now arises whether the premises for the broadcast rules remain. It is argued that the frequencies used by broadcasters are no longer scarce (that is, there are many opportunities to become broadcasters) and that there is sufficient competition to broadcasters to further open public choice. The opponents of S. 577 also claim that the Fairness Doctrine does not work and that it chills the speech of broadcasters. For the reasons that follow, the Committee finds these arguments are not supported by evidence and concludes that the rationale for the Fairness Doctrine remains sound.

2. The Fairness Doctrine and the Court

The Supreme Court's acceptance of public interest regulation of broadcasters dates back to the early 1930's. In *FRC* v. *Nelson Bros. Bond & Mortgage Co.,* 289 U.S. 266 (1933), the Court upheld the authority of the FRC to reallocate frequencies among communities, even where this involved taking a license away from a party already broadcasting. In *FCC* v. *Pottsville Broadcasting Co.,* 309 U.S. 134 (1940), the Court noted that the public interest standard effected Congressional desires to "maintain a grip on the dynamic aspects of radio transmission" and to reduce fears that in the "absence of governmental control, the public interest might be subordinated to monopolistic domination of the broadcast field." Id. at 137–138. In *National Broadcasting Co.* v. *United States,* 319 U.S. 190 (1943), the Court for the first time heard the argument that public interest regulation of broadcasting violated the First Amendment. In rejecting this position, the court concluded that, because government must choose among licensees, denial of a license on a basis "comprehended within the statutory criterion of 'public interest'" was not denial of free speech. Id. at 226–27.

That the "scarcity" of the broadcasting frequencies allows imposition of public interest obligations upon broadcasters was first recognized in *National Broadcasting Co. (NBC)* This scarcity is not based simply on the number of electronic outlets, but on the number of those who seek broadcast frequencies compared to the number of frequencies available. Thus, in *NBC,* Justice Frankfurter observed that:

> Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristics, and that is why, unlike other

> modes of expression, it is subject to governmental regulation.

Id. at 226. An obvious implication of the *NBC* court's holding that licenses may be denied on the basis of public interest criteria is the recognition that broadcast licensees may, under the First Amendment, be affirmatively required to serve the public interest generally rather than simply seeking private gain.

Perhaps the clearest judicial articulation of this public interest principle occurred twenty years ago in *Office of Communication of United Church of Christ* v. *FCC,* 359 F.2d 994 (D.C. Cir. 1966). In the course of ordering the FCC to conduct a hearing sought by representatives of the listening public to examine charges of racial and religious discrimination and Fairness Doctrine violations by a licensee, the court, speaking through Judge Burger, said:

> A broadcaster has much in common with a newspaper publisher, but he is not in the same category in terms of public obligations imposed by law. A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot. After nearly five decades of operation the broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust subject to termination for breach of duty.

359 F.2d at 1003.

Three years later, when the case was again before the Court of Appeals, Judge Burger once more recognized the role of broadcasters as fiduciaries:

> [B]y whatever name of classification, broadcasters are temporary permittees—fiduciaries—of a great public resource and they must meet the highest standards which are embraced in the public interest concept. The Fairness Doctrine plays a very large role in assuring the public resource granted to licensees at no cost will be used in the public interest.

Office of Communication of United Church of Christ v. *FCC,* 425 F.2d 543, 548 (D.C. Cir. 1969).

The Fairness Doctrine was unanimously upheld in *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969). The Court surveyed fifty years of broadcasting history, including 20 years of experience with the Fairness Doctrine, and found the Doctrine constitutional. The Court observed that:

> [O]nly a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had.

395 U.S. at 388. Thus, "where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak,

write or publish." *Id.* at 388. Instead, the public interest standard applicable to broadcasters makes paramount the rights of viewers:

> [b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio, and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.

Id. at 390. This paramount interest of the public, as well as the interest of those speakers denied broadcast frequencies, rendered constitutional a decision to treat broadcasters as "prox[ies] or fiduciar[ies]" for the community at large as well as for those who "would otherwise, by necessity, be barred from the airwaves." *Id.*

It is noteworthy that in *Red Lion* broadcasters argued, much as critics of the Fairness Doctrine argue today, that technological developments since the *NBC* decision had reduced the scarcity of broadcast facilities to the point where the challenged rules were no longer a permissible attempt to further other First Amendment values and increase opportunities for speech. In responding to these contentions, the Court did not emphasize, and indeed barely even discussed, the absolute number of broadcast facilities in particular markets. Instead, it observed that "comparative hearings between competing applicants for broadcast spectrum space are by no means a thing of the past." *Id.* at 398. The Court thus indicated that it was mainly concerned with scarcity relative to demand, not some shortage of outlets. The Court made this clear by noting that "nothing in this record or in our own research convinces us that the resource is no longer one for which there are more immediate and potential uses than can be accommodated * * *". Id. at 399.

The Committee believes this conclusion remains correct. Demand for broadcast frequencies still exceeds supply, and governmental licensing and regulation are necessary to resolve competing claims to these frequencies.

The initial involvement of government in the selection of broadcast licensees limits the relevance of one of the overriding concerns of First Amendment jurisprudence: the necessity of preserving the full independence of the press and individual speakers from government oversight. For example, in *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974), the Supreme Court held that a statute which provided for a right to respond to newspaper attacks upon candidates for public office was unconstitutional. In striking down the statute, the Court emphasized the "government coercion" involved in enforcing such a right of reply, Id. at 255, as well as the level of governmental interference in the operation of the press that such a right would entail. In his concurring opinion, Justice White adverted to the "virtually insurmountable barrier between government and the print media insofar as government tampering in advance of publication with news and editorial content is concerned." Id. at 259.

Such concerns are obviously of limited relevance in the context of broadcasting. The rigid wall separating government and the printed press does not exist, since the FCC must, of necessity, select among competing applicants for available broadcast frequencies, and ensure that licensees abide by rules governing the use of these frequencies. The government's affirmative involvement in broadcasting presents the opportunity for government to fashion creative regulatory regimes to vindicate a range of First Amendment interests left unprotected by a strict separation between government and the system of freedom of expression.

Since *Red Lion*, the Supreme Court has consistently reaffirmed the scarcity and public trustee rationales, while upholding regulation of broadcasters against First Amendment attack. Four years after *Red Lion*, in *Columbia Broadcasting System Inc.* v. *Democratic National Committee* 412 U.S. 94 (1973), the Court reiterated the scarcity rationale for broadcast regulation:

> The broadcast media pose unique and special problems not present in the traditional free speech case. Unlike other media, broadcast is subject to an inherent physical limitation. Broadcasting frequencies are a scarce resource; they must be portioned out among applicants.

Id. at 101.

Recognizing that the Fairness Doctrine was sufficient to ensure that a licensee's journalistic discretion was exercised in the public interest, the Court observed that:

> It was reasonable for Congress to conclude that the public interest in being informed required periodic accountability on the part of those who are entrusted with the use of broadcast frequencies, scarce as they are. In the delicate balancing historically followed in the regulation of broadcasting Congress and the Commission could appropriately conclude that the allocation of journalistic priority should be concentrated in the licensee rather than diffused among many. This policy gives the public some assurance that the broadcaster will be answerable if he fails to meet its legitimate needs.

Id. at 125.

In *FCC* v. *National Citizens Committee for Broadcasting (NCCB)*, 436 U.S. 775 (1978), the Court upheld FCC regulations prohibiting cross-ownership of newspapers and broadcast stations against First Amendment challenge. While conceding that the regulations were "designed to further the First Amendment goal of achieving diversity of information", both broadcasters and newspapers argued that the rules violated the First Amendment rights of newspaper owners. Id. at 799. In response, the Court observed that:

> [T]he physical limitations of the broadcast spectrum are well known. Because of problems of interference between broadcast signals, a finite number of frequencies can be used productively; this number is far exceeded by the number of persons wishing to broadcast to the public. In light of this physical scarcity, government allocation and regulation of broadcast frequencies are essential as we

> have often recognized. * * * We see nothing in the First Amendment to prevent the Commission from allocating licenses so as to promote the "public interest" in diversification of the mass communications media.

Id.

That this still represents the view of the Supreme Court is confirmed by its 1981 opinion in *CBS, Inc.* v. *FCC*, 453 U.S. 367 (1981). While *NCCB* emphasized the scarcity rationale in upholding broadcast regulation, *CBS, Inc.* v. *FCC* unequivocally reaffirmed that broadcasters must still be considered public trustees whose licenses are conditioned upon continued service in the public interest. In *CBS*, the Court upheld a limited right of access of Federal candidates to broadcasting facilities established in section 312(a)(7) of the Communications Act. In rejecting the broadcasters' First Amendment challenge, the Court cited *United Church of Christ* and again reaffirmed that "a licensee is 'granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise, it is burdened by enforceable public obligations.' " 453 U.S. at 395, quoting *United Church of Christ*, 359 F.2d at 1003. The Court recognized that the Federal candidate access section of the Communications Act "represents an effort by Congress to ensure an important resource—the airwaves—will be used in the public interest." 453 U.S. at 397.

The Court's language in *CBS, Inc.* v. *FCC*, as well the inescapable fact of governmental licensing of broadcasting, indicates that the argument that the Fairness Doctrine imposes an unconstitutional condition on the grant of broadcast licenses and upon the exercise of First Amendment rights is without merit. As *CBS, Inc.* v. *FCC* indicates, such an argument is simply inapplicable in the context of broadcasting. In fact, the Court has found that imposing conditions such as those embodies in the Fairness Doctrine advances, rather than inhibits, First Amendment values. The Court observed in *Red Lion* that:

> [T]o condition the granting or renewal of licenses on a willingness to present representative community views of controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press.

395 U.S. at 394. Similarly, in *NCCB*, the Court rejected an argument that the FCC's cross-ownership restrictions "unconstitutionally condition[ed] receipt of a broadcast license upon forfeiture of the right to publish a newspaper," noting, inter alia, that the purpose and effect of the regulations was "to promote free speech, not to restrict it." 436 U.S. at 800–801. The import of these cases is that the government may properly impose conditions on the use of broadcast frequencies, such as the condition embodied in the Fairness Doctrine, where these restrictions further First Amendment values.

Arguments by opponents of the Fairness Doctrine that the Supreme Court has undermined the constitutional underpinnings for the Doctrine are misplaced. The Supreme Court has consistently reaffirmed that the scarcity of broadcast frequencies—the scarcity

relative to demand for frequencies which necessitates governmental licensing—allows such reasonable regulations. Most recently, in *FCC* v. *League of Women Voters of California*, 468 U.S. 364 (1983), the Court reiterated that:

> [T]he fundamental distinguishing characteristic of the new medium of broadcasting that, in our view, has required some adjustment in First Amendment analysis is that "[b]roadcasting frequencies are a scarce resource [that] must be portioned out among applicants."

468 U.S. at 377, quoting *Columbia Broadcasting System Inc.* v. *Democratic National Committee,* 412 U.S. at 101. The notion that a broadcaster is a public trustee has similarly been reaffirmed. In addition, the Court recognized the "substantial governmental interest" in "insuring adequate and balanced coverage of public issues" served by the Fairness Doctrine. 468 U.S. at 380.

3. Spectrum scarcity

In addition to being founded on the broadcasters' public trustee responsibilities, the Fairness Doctrine is also premised on the fact that there are more people who want to broadcast—that is, air information to the general public—than available frequencies: "The scarcity of frequencies should not be measured by the number of *stations* allowed to broadcast, but by the number of *individuals or groups* who wish to use the facilities, or would use them if they were more readily available." Emerson, T., "The System of Freedom of Expression," p. 662, (1970) (emphasis in original). The primary argument of opponents of the Fairness Doctrine is that the spectrum is not scarce because there are many more broadcast licenses than in 1949 or since *Red Lion.* However, the fact remains that the demand for broadcast stations far exceed their availability.

The most obvious measure of relative demand for broadcast frequencies is the economic value of the valuable license conveyed by the government. The evidence shows that today millions to hundreds of millions of dollars are paid for broadcast stations and that the value of stations has increased greatly over the past thirty years. Independent VHF stations have recently sold for as much as $450 million in Boston, $510 million in Los Angeles, and more than $700 million in New York. "Changing Hands 1985," *Broadcasting,* January 27, 1986, at 91-110. In 1987, three broadcast station group sales alone accounted for $3.6 billion of the total $7.5 billion in sales for 1987. In 1988, television stations have sold for as much as $160 million (Puerto Rico) and $100 million (Buffalo, New York). FM stations have sold for as much as $56 million (Los Angeles, California), $46 million (Washington, D.C.), and $32 million (Philadelphia, Pennsylvania). For a review of the $4,947,838,198 worth of broadcast station sales during 1988 (for 1,021 stations), See, "Changing Hands 1988" *Broadcasting,* February 13, 1989, at 41-60. In contrast, in 1958, station sales totaled $127,537,026; 1968, $152,455,412; and 1978, $651,728,398.

Another gauge is the demand for new stations. It is as true today as in 1969 that "comparative hearings between competing applicants for broadcast spectrum are by no means a thing of the past."

Red Lion, 395 U.S. at 388. In November 1986, the FCC had 142 pending comparative proceedings involving multiple applicants for broadcast facilities. That number has increased to 237 as of March 31, 1989.[7]

Moreover, many of these proceedings, particularly those for facilities in major markets, involve large numbers of applicants. For example, 47 applicants applied for authorization to operate a new FM radio station on Channel 255A at Orlando, Florida. FCC Public Notice, Report No. NA-28, released February 12, 1987. See also, Hearing Designation Order, MM-2356 49 Fed. Reg. 6994 (February 24, 1983) (26 applicants for deleted facilities of WHBI, Newark, New Jersey); Hearing Designation Order, MM-8990, April 13, 1989 (10 applicants for a new UHF station in Las Vegas, Nevada); FCC Report No. NA-87, February 1, 1989 (14 applicants for a new FM radio station, Modesto, California, 8 applicants for a new FM radio station, San Clemente, California).

Even the smaller markets generate multiple mutually exclusive applicants. See, e.g., Hearing Designation Order, MM-1835, released January 9, 1986 (13 applicants for a new UHF television station at Newton, New Jersey); Hearing Designation Order, MM-4416, released May 13, 1986 (12 applicants for a new VHF television station at Avalon, California); Hearing Designation Order, DA 86-201, released November 20, 1986 (5 applicants for a new UHF televisions station at Charlottesville, Virginia); Hearing Designation Order, DA 87-299, released March 25, 1987 (14 applicants for a new FM radio station at Smryna, Delaware); Hearing Designation Order, FCC DA 87-198, released March 13, 1987 (4 applicants competing for a new FM station at Ridgebury, Pennsylvania); Hearing Designation Order, FCC DA 87-272, released March 17, 1987 (3 applicants designated for comparative hearing for a new television station at Jackson, Wyoming); Hearing Designation Order, MM-5201, released June 18, 1986 (3 applicants for a non-commercial UHF television station at Milford, New Jersey).

In fact, on one day, March 17, 1987, the FCC designated 20 applications for hearings for seven broadcast stations. See, FCC Daily Digest, Mimeo No. 2372, March 17, 1987. Thus, "[t]here is a continuing serious scarcity of broadcast channels for those who wish to operate one, and the fact that there may be more stations on the air than in previous years does not alter the fact that—depending upon technical advances that may someday make available sufficient channels that reach out to the public—that scarcity will remain with us." Hilliard, Robert L. and Robert G. Picard, "Plurality, Diversity, and Prohibitions on Television-Newspaper Crossownership," "Journal of Media Economics" (Emerson College) (Spring, 1989) p. 55 at 61-62.

In other contexts, the FCC itself has acknowledged that there is a "secretary of spectrum." See e.g., FM Subsidiary Communications Authorizations, 55 RR 2d (P&F) 1607, 1613 n. 19 (1984), rev'd on other grounds, *People of the State of California* v. *FCC,* 798 F.2d 1515 (D.C. Cir. 1986). In the FM Subsidiary proceeding, the FCC

[7] This figure includes all applications that have been designated by the FCC for hearing. It does not include applications that have been filed but not yet designated for hearing and low power or translator applications.

stated: "[T]he mandate of Section 301 that we provide for the use of channels authorizes the Commission to allocate the Nation's scarce spectrum resources. In attempting to satisfy that mandate, the public's need for new or additional services must be balanced against the limited spectrum available. In sum, we strive for economy in the use of spectrum."

In "FCC Discovers That Carving Up the Spectrum Isn't What It Used To Be," "National Journal," May 19, 1984, at 983, Dale N. Hatfield, a communications consultant and one time Deputy Administrator at the National Telecommunications and Information Administration, summed up the problem: "The appetite for new spectrum space is unlikely to be sated any time soon. Technology has expanded the number of usable radio frequencies enormously in the past decade, but demand is growing even faster—and will continue to . * * *" Similarly, Ken Nichols, Deputy Chief of the FCC's Spectrum Management Division, in describing the cordless industry's search for spectrum, noted that: "They don't want a lot [of spectrum] .* * * [t]he problem is, there isn't a lot left." *Id.* at 983.

Battles over allocation of spectrum often develop into the longest and most ferocious proceedings before the FCC, and for good reason. It is virtually impossible to offer many mass communications services without spectrum. When such an essential resource is divided by the number of current and proposed services, severe conflicts and difficult choices are the result. The FCC devoted almost 17 years to resolving competing claims for the same spectrum lodged by the cellular radio industry, providers of land mobile service, public safety officials, and proponents of a mobile satellite service.[8] See, Report and Order (Gen. Docket Nos. 84-1231, 84-1233, and 84-1234) FCC 86-333, released September 26, 1986. See, Notice of Proposed Rulemaking, (Gen. Docket 82-334) 48 Fed. Reg. 6730 (February 15, 1983); Report and Order, 81 RR 2d 1341 (1982); Second Report and Order, (Gen. Docket 334) 50 Fed. Reg. 7338 (February 22, 1985); Second Report and Order, (Gen. Docket 82-334) 50 Fed. Reg. 51420 (December 17, 1985); Third Report and Order, FCC 86-523, released February 23, 1987. See also, First Report and Order and Second Notice of Inquiry, (Docket No. 18262) 35 Fed. Reg. 8644 (June 4, 1970); Second Report and Order, (Docket No. 18262) 46 FCC 2d 752 (1974) on recon. 51 FCC 2d 945 (1975); Order on recon. FCC 78-854 (1978) aff'd sub. nom *NARUC* v. *FCC*, 525 F.2d. 630 (D.C. Cir. 1976), cert. denied. 425 U.S. 992 (1976).

With the advent of Direct Broadcast Satellites (DBS), the FCC spent years determining whether to re-allocate a portion of the spectrum for use by DBS systems. See, Report and Order, 51 RR 2d 1341 (1982). In re-allocating a portion of the 12 gigahertz band for use by DBS, the FCC displaced certain private fixed microwave users. The FCC then spent five years trying to allocate frequencies for those fixed service users.

Most recently, the FCC has been wrestling with the issue of whether to re-allocate certain UHF-TV frequencies for land mobile

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[8] In its Report and Order (General Docket Nos. 84-1231, 1233, and 1234 at para. 3), the Commission stated, "Since the late 1960's, we have recognized that without additional allocations serious land mobile spectrum shortfalls would develop before the end of the century."

services. Broadcasters and the proponents of High Definition Television (HDTV) vigorously oppose the proposal. Although HDTV is not yet available to the public, its supporters anticipate that it will be on the air in the next decade. Consequently, it is argued that the UHF-TV frequencies should be reserved for HDTV. After conducting an inquiry (which commenced several years ago) into the proposed reallocation of spectrum to land mobile, the FCC determined that the record was not sufficient to render a decision on the appropriate use of the available UHF-TV spectrum. The FCC is now gathering additional evidence. See, "Communications Daily," March 12, 1987, p.1.

Even the focus of the HDTV debate today is to determine how to find sufficient spectrum—since the television spectrum is inadequate—for the may proposed schemes of HDTV. Since the FCC believes that sufficient spectrum cannot likely be found, it has an inquiry under way to determine how to incorporate this technology into the present television spectrum.

These are just a few of the recent spectrum battles. There have been many more, including those between public safety services and broadcasters, amateur radio operators and land mobile services, common carrier and private mobile services. There also have been conflicts within services, for example, when television broadcasters opposed VHF-Dropins. The Committee knows of most of these battles first hand, since parties want the Committee's support for their positions at the FCC. The conclusion we must draw is that spectrum is scarce; demand far exceeds supply. Even the National Association of Broadcasters, which opposes S. 577, agrees with this conclusion. As Edward Fritts, the President of the National Association of Broadcasters, stated: "No one challenges the fact that valuable spectrum space is scarce. * * * [It] should be used to serve all the public." Remarks of Edward O. Fritts to High Definition Policy Forum of Annenberg Schools, Washington, D.C., December 15, 1986 at p. 2.

In its 1985 Fairness Doctrine Report, the FCC contends that the increase in the number of broadcast stations undercuts the scarcity rationale articulated in *Red Lion*. The following chart provides a comparison of the number of stations in 1969 and 1989.

Service	1969	1989
AM	4,265	4,957
FM	2,330	5,608
UHF-TV	577	669
UHF-TV	260	745

See, FCC News Release, No. 3526, July 7, 1989. The growth in the number of broadcast stations, however, has not occurred in isolation. The Nation's population has soared over the last 18 years, from 202,494,000 in 1969 [9] to 245,807,000 in 1988.[10] Accompanying

[9] Estimated resident population of the United States and Components of Change, U.S. Census Bureau, p. 25, No. 99 (July 1986).

[10] See, U.S. Census Bureau Press Release CB 88-205, March 29, 1989.

the population growth have been increased media literacy and the recognition of the ability of broadcasting to serve as an effective means of communications. In addition, there are the already demonstrated tremendous number of new services seeking spectrum. As a result, while there may be more stations, there are also many more parties who would like to use those stations. In reality, scarcity is at least as great a problem as in the past.

The FCC's reliance on the increase in the number broadcast outlets since the time of *Red Lion* [11] also overlooks the fact that most of the increase has been in the UHF and FM Band in smaller markets, not major markets. The last community to be allocated a new VHF outlet was New York (WOR), which went on the air in 1949. (The station is now WWOR and was moved in 1983 at Congressional direction to New Jersey.) Conrad, Mark, "The Demise of the Fairness Doctrine: A Blow for Citizen Access", "Federal Communications Law Journal," Vol. 41, No. 2, April 1989, pp. 161, 187. "[E]ven if the FCC's numbers are accepted at face value, it is questionable that the Fairness Doctrine ceases to be constitutional because there are over 11,000 radio stations in 1987 when it was deemed constitutional in 1969 when there were 6,600 in existence." Id.

In its 1985 Fairness Doctrine Report, the FCC refers to the number of vacant FM and television channels as support for its assertion that there is no longer a shortage of spectrum. 1985 Fairness Doctrine Report, 102 FCC 2d at 202–208. Currently, there are 62 VHF (18 non-commercial and 44 commercial) and 431 UHF (344 non-commercial and 148 commercial) vacant channels. There are, however, only 40 UHF and 1 VHF commercial vacancies,[12] in the top 50 markets. See, FCC Public Notice Mimeo 1885, March 10, 1989. In addition, the FCC's claim that there are a large number of vacant FM channels rests largely on the creation of 689 new FM channels in 1985. See, 1985 Fairness Doctrine Report, 102 FCC 2d at 203; Report and Order (Docket 80–90), 53 FCC 2d 1550 (1983); First Report and Order, (MM Docket No. 84–231), 50 Fed. Reg. 3514, January 25, 1985; Second Report and Order (MM Docket No. 84–23, FCC 85–124, released April 12, 1985. At the same time, the FCC has been inundated with applications for available broadcast channels.

The FCC and opponents of the Fairness Doctrine also cite new methods of transmitting information—"new technologies"—as another factor that undercuts the scarcity rationale. The Committee rejects those arguments for several reasons. First, scarcity is not a matter of the absolute number of broadcast outlets or new forms of electronic media; as long as more people seek licenses to use the spectrum than can be accommodated, there is scarcity. Second, as noted above, the arguments ignore the fact that broadcasters are statutorily obligated to serve as public trustees, and are granted the use of a valuable resource. In return, they can and should be subject to modest requirements to assure that their trust is exer-

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[11] As of June 1989 there were 1,685 television stations and 11,761 radio stations compared with approximately 900 television and 6,600 radio stations in 1969. *See, Broadcasting,* June 5, 1989, at 15; *1985 Report,* 202–145.

[12] Within 55 miles of the Area of Dominant Influence (ADI) title city.

cised in the public interest. Third, we disagree that scarcity is a thing of the past, even in absolute terms. Of these new technologies cited by the FCC, only cable television has even begun to reach a significant number of households, and a great deal of what cable offers and what its audience watches is retransmitted "conventional" television stations.

The data cited by the FCC show that 62 percent of the American households are passed by cable. See, Notice of Inquiry, FCC 84-140, Released May 8, 1984, 18-19. As of May, 1989, 86 percent of the American television households (78,133,000 households [13]) are passed by cable. See, A.C. Nielsen, May 1989. These numbers, however, can be a deceptive measure of a meaningful impact by cable systems. Even where cable is available, many people do not subscribe. There are approximately 50,241,840 million cable subscribers, which represent 55.6 percent of all the American television households. Id. Many of those subscribers are limited to "basic" or retransmitted broadcast service, and most of the viewing, even in homes subscribing to pay cable services, is of traditional broadcast services.

Cable, as with many of the other "new technologies", also differs from broadcasting in a fundamental and extremely relevant characteristic: cable is not freely available to any home with a television. There is a basic subscription fee, which averaged $14.45 in 1989, and, in many cases, an additional fee for the premium service which offers some degree of diverse, albeit general entertainment, programming. See, Paul Kagan Associates, Inc., "The Pay TV Newsletter," May 26, 1989, p. 2.

Another fundamental difference between cable and over-the-air broadcast stations is in their program content. Most of the programming on cable consists of retransmitted television signals, reruns of syndicated programming, movies, sports, and some national news. While cable television has successfully developed a national news network, CNN, it does not provide any regular local news and local public affairs programming (with the exception of some local access channels). Those channels that do provide nonentertainment programming:

> rely heavily on personalities from other established media and tend to seek out the same officials and experts to which newspapers and broadcasters attend, bolstering the views given in other media. Thus, cable cannot yet be considered a significant provider of new viewpoints or diversity.

Hilliard, Robert L. and Robert G. Picard, "Plurality, Diversity, and Prohibitions on Television-Newspaper Crossownership," at 63.

To the extent that the FCC cites other technologies, such an argument is tenuous at best. For example, as of September 1989, there were only an estimated 300,000 Multipoint Distribution System (MDS) subscribers and Multiple Multipoint Distribution System (MMDS) subscribers, or 0.33 percent of the 90 million television homes. Similarly, Satellite Master Antenna Systems (SMATV) have only an estimated 771,000 subscribers, or 0.85 per-

[13] See, Paul Kagan, Cable TV Programming, May 16, 1989, p. 6.

cent of American television households. See, Paul Kagan, Cable TV Programming, September 29, 1988. Other new services such as Low-Power Television (LPTV) [14] are just beginning to operate. As of May 1989, there were only 635 LPTV stations in operation.[15] There also have been a number of LPTV stations that have gone on the air and have stopped operating because of financial difficulty, *e.g.* the LPTV station in Twin Falls, Idaho. Teletext service has just barely gotten started, and is stymied by considerable marketing problems and the lack of technical standards. DBS can be found in the FCC's rules, but barely in the marketplace.

In general, the Committee has received no hard evidence that any of these new over-the-air services will succeed. Further, the Committee believes it is highly questionable whether these new services will provide more than "entertainment" programming, that is, provide the public with news and public affairs programming. For example, it is fallacious to refer to the growth of videocassette recorders, compare them to broadcast stations, and claim they provide alternatives for the discussion of matters of public importance and increase the knowledge vital to our citizens. As of today, these new services may offer promise of this but little more.

At best, it only can be argued that the American public has

> a quantitative diversity but not a qualitative diversity in media. Where views are presented, they most often reflect those of the owners of the newspapers and television stations. Because such owners by and large present—by the very nature of their economic, social and/or political position that enables them to be owners of a medium or media—the status quo of a community, we find in most communities the lack of any significantly diverse viewpoints and the lack of viewpoints representing minorities, women, and other groups not represented by or agreeing with the views of the economic/social/political elite.

Hilliard, Robert L. and Robert G. Picard, supra at 62–63. As of 1986, 2.1 percent (38 television and 209 radio) of the over 1,200 television and 10,000 radio stations in the United States were owned or controlled by minorities. See, "Minority Broadcasting Facts," National Association of Broadcasters, September, 1986.[16] In 1988, the percentage of minority owned stations decreased to 1.9 percent. In other words, 232 stations were more likely to serve the minority population of this country—over 20 percent of the total population.[17] Certainly, it is clear that, while there may be more stations in this country, the diversity of ownership does not reflect the diversity of this Nation's population.[18]

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[14] LPTV stations are over-the-air television stations that are limited to 10 watts for VHF and 1,000 watts for UHF.

[15] Approximately 300 of these stations are translator stations or stations that merely retransmit another broadcast station.

[16] The term minority includes Black, Hispanic, Native American, and Asian American Groups.

[17] In 1988, it was estimated that there were 29 million Blacks and 18 million Hispanics in the United States.

[18] *See, Minority Broadcasting Station Ownership and Broadcast Programming: Is There a Nexus,* CRS Economics Division, Library of Congress (1988), which concluded that minority owners of broadcast stations provide more programming aimed at minorities than stations with no minority ownership.

The opponents of the Fairness Doctrine regularly argue that it is newspapers that are truly scarce, not broadcast stations. They base this argument on the fact that the number of daily newspapers in this country has decreased significantly over the past 30 years, that few cities have more than one daily newspaper, and that is it very difficult to start a new daily newspaper. While comparisons between the broadcast media and daily newspapers may seem relevant to the degree of government control over broadcast licensees, in fact, they have little validity.

Aside from the fact that the opponents' argument likely is incorrect as to the economic scarcity of daily newspapers, it has a much more fundamental flaw. It completely ignores the government's need to control spectrum and its scheme of licensing these frequencies. As was raised previously, the American system of broadcasting is an artificial construct resulting from this government control. There did not have to be such a system and possibly no broadcasting media at all. Video programming could have travelled into our homes by wire, as with cable television. Competition for this spectrum has been fierce. Many spectrum users and potential users would want these "broadcast" frequencies and use them extensively. As a trade-off for the unique system of broadcasting our government created, licensees have certain obligations. So long as potential licensees have no alternative media to use, these obligations need to remain in effect.

In contrast, there are no similar, government-created limitations to entry into the newspaper field.[19] No goverment license is required. While the current economics of the newspaper industry are such that it is difficult today for more than one daily newspaper to exist in each market, anyone can freely enter. That is what the Washington Times did, for example.

Yet in the same market, there are no open broadcast frequencies. The debate over the need to regulate broadcast frequencies certainly has an economic element, but it is only one part of the basic public interest standard. No one can persuasively argue that spectrum is parcelled on pure free-market economics. The scarcity discussed in examining the spectrum is not just an "economic scarcity", because the FCC's allocation is based on much more. It is that basic difference that makes comparisons between the broadcast media and daily newspapers inapposite.

To demonstrate further that there are few, if any, alternatives to holding a broadcast license, one should examine the Committee's 1985 and 1989 hearings on the Clean Campaign Act, legislation concerning the use of broadcasting during election campaigns. Throughout these hearings, the Committee heard testimony that broadcast and other media were not comparable, that election campaigns were largely run with broadcast advertisements, which consumed between 50 percent and 90 percent of a candidate's funding. The most telling statement was made by Curtis Gans, Vice-Presi-

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[19] There are, however, certain content-related regulations with which newspapers must comply to obtain particular government-bestowed benefits. For example, newspapers must devote at least twenty-five percent of their space to news and editorials to obtain the lower second class postage rate. The second class mailing permit, a government subsidy, "is based upon the concept that the electorate in a free democracy must be informed." See 1985 Fairness Hearing, statement by Roy M. Fisher.

dent and Executive Director of the Committee for the Study of the American Electorate, who said:

> Television is not simply another means of communication. It is to conventional means of communication what nuclear weaponry is to conventional weaponry.

While this evidence may be seen as support for broadcasting's importance or effectiveness, that is not why it is mentioned and supportive of the Committee's finding. Rather, it establishes a rationale for the tremendous demand to hold broadcast licenses and helps explain why all the alternatives given by the FCC in its 1985 Fairness Doctrine Report are not comparable in fact. The Committee strongly believes that the reality of modern mass media—not some abstract theory—shows the demand and that broadcast licenses are scarce.

THE FAIRNESS DOCTRINE INCREASES SPEECH ON IMPORTANT ISSUES

At the March 18, 1987, hearing on S. 742, Charles Ferris, a former Chairman of the FCC, articulated the "beauty" of the Fairness Doctrine:

> It furthers First Amendment Principles, because it requires more information. * * * the only remedy under the Fairness Doctrine, if you go through the process. * * * is: Go out and cover the story some more, more information; do not let it be one sided, do not let it be out of balance.

An examination of the day-to-day workings of the Fairness Doctrine demonstrates that Mr. Ferris is correct. Rather than operating to restrict speech, the Fairness Doctrine increases speech on issues of public importance. The Fairness Doctrine has effectively served the substantial government interest recognized in *League of Women Voters* in guaranteeing that the public receives contrasting viewpoints on controversial issues of public importance and also has vindicated the interests of non-media speakers in airing their viewpoints. The Supreme Court, based upon twenty years of experience with the Doctrine, found this to be the case in *Red Lion,* as did the FCC in 1974. 1974 Fairness Report, 48 FCC 2d 1 (1974).

No material changes in circumstances have occurred since *Red Lion* to undermine these conclusions. The Fairness Doctrine has created substantial opportunities for expression by those "who wish to exercise their freedom of speech even though they are not members of the press." *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 266 (1964). While the Fairness Doctrine does not confer upon particular groups or individuals a right to air their views,[20] both the Courts [21] and the FCC have recognized that broadcasters, as one means of complying with Fairness Doctrine obligations, should allow speakers to present their own views directly to the public. For example, the FCC has stated that:

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[20] As noted infra, under the Fairness Doctrine, the FCC accords broadcasters substantial discretion in determining how to meet their Fairness Doctrine obligation in any particular case.

[21] *See, Columbia Broadcasting System,* v. *Democratic National Committee,* 412 U.S. at 111-112, 131, Cf. *Red Lion,* 395 U.S. at 392, n.18 (noting importance of expression of opposing views by persons who actually believe them).

> As a public trustee [the broadcaster] must present representative community views and voices on controversial issues which are of importance to his listeners * * * and this means also that some of the voices must be partisan. A licensee policy of excluding partisan voices and always itself presenting views in a bland inoffensive manner would run counter to the "profound national commitment that debate on public interest issues should be uninhibited, robust, and wide open."

Democratic National Committee, 25 FCC 2d 216, 222-23 (1970). See also, *Cullman Broadcasting Co.,* 40 FCC 576, 577 (1963) (where a licensee permits use of its facilities for expression of one viewpoint on a controversial issue, reasonable opportunities must be afforded for "presentation of contrasting views by spokesman by other responsible groups").

The Fairness Doctrine has provided significant opportunities for individual and group expression both formally before the FCC and in direct informal negotiations with broadcasters for coverage of opposing views on critical issues. See generally, F. Rowan, Broadcast Fairness: Doctrine, Practice Prospects, 71-88 (1984). Through such negotiations, groups and individuals have obtained free and paid advertising time as well as opportunities to appear on news programs and talk shows. Andrew Schwartzman, executive director of the Media Access Project, has stated that "most of the dealings with the Fairness Doctrine are informal, the more informal the better so that local groups get to establish an ongoing relationship with the news people of the local station." F. Rowan, *Broadcast Fairness,* at 72.

Indeed, in its 1985 *Fairness Doctrine Report,* The FCC points to cases in which groups have used the Fairness Doctrine in order to obtain advertising time which would otherwise have been denied. 1985 Report, 102 FCC 2d at 162-63, n.73. Without the Fairness Doctrine, it is far from certain that many broadcasters would even discuss reasonable requests from individuals or groups seeking to present their views. In Congressional hearings in 1984 and 1989, testimony was presented demonstrating that, in many instances, the Fairness Doctrine was the sole basis upon which they were granted access to broadcasting facilities. Freedom of Expression Act of 1983: Hearings on S. 1917 before the Senate Committee on Commerce, Science, and Transportation, 98th Congress, 2d session, 101-04, 131-42 (1984). Hearings on the Fairness in Broadcasting Act of 1989 (S. 577) before the Senate Committee on Commerce, Science, and Transportation, 101st Congress, 1st session, 27-36 (1989).

For example, Elaine Donnelly, Special Projects Director, Eagle Forum, testified that from 1972-1982, 95 percent of the network broadcasts devoted to the Equal Rights Amendment (ERA) presented the pro-ERA viewpoints. The anti-ERA positions represented only five percent of the total airtime devoted to the subject. Ms. Donnelly stated that: "If it were not for the Fairness rules that the women of the Eagle Forum invoked at the local level, as a means to exercise our rights of free speech, it is entirely possible that ERA would have been ratitifed without any real understanding of its true effect." Freedom of Expression Hearings (1984) at 132. Ms.

Donnelly went on to point out that the "Fairness rules are neutral in their impact, available to liberals and conservatives, pros and cons alike, no matter what the issue might be." Id. See also, Statements of Robert Gurss, Media Access Project, Id. at 91–95; Reed Irvine, Accuracy in Media, Id. at 97–98; Ronald W. Cahtell, National Association of Arab Americans, Id. at 98–104.

Although the Fairness Doctrine continues to apply to ballot issues,[22] citizens have found, since the *Syracuse* decision, that it is more difficult to obtain access to broadcast stations to discuss ballot issues. For example, the Safe Energy Communications Council (SECC) and the U.S. Public Interest Research Group (PIRG) submitted testimony to the Committee in 1989 concerning the efforts of individuals and organizations to present opposing viewpoints on ballot issues in State elections. See, Testimony of Scott Denman at the 1989 Senate Communications Subcommittee Hearing on the Fairness Doctrine at 29–30. Mr. Denman testified that:

> Of the 432 radio stations that had carried programming addressing referendum issues in five States SECC and U.S. PIRG found that:
>
> Virtually one-quarter (31 of 135) of the licensees did not initially realize that the Fairness Doctrine was still in existence with regard to ballot issues.
>
> Ninety-eight percent of the remaining 297 broadcasters that accepted that Fairness Doctrine's existence, immediately or subsequently agreed to fulfill their obligation to provide their audiences with additional programming presenting opposing viewpoints on the ballot issues when the problem was called to their attention.
>
> However, in stiking contrast, only 56 percent of the 135 stations that initially denied the Doctrine's existence eventually presented opposing points of view. This change typically followed the submission of information to persuade those broadcasters that the FCC was still enforcing the Fairness Doctrine in Ballot cases.
>
> In spite of this evidence, 14 percent or 59 stations continued to refuse to honor their Fairness Doctrine obligation. [Footnote omitted.]
>
> Overall, 85 percent of the 432 stations ultimately provided additional airtime for opposing points of view. * * *
>
> Our findings demonstrate the compelling need for the immediate codification of the Fairness Doctrine. The performance of those who incorrectly or initially assumed that they had no Fairness Doctrine duties—nearly one-third of all stations—show the deleterious effect of the repeal of the Doctrine on the public's ability to be exposed to both sides of controversial issues of public importance.

Id. at 342–33.

The fact that a significant number of stations only presented an opposing viewpoint after they were requested to do so indicates

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[22] The *Syracuse* decision only applied to the General Fairness Doctrine and not certain special applications. *See*, September 22, 1987 letter from FCC Chairman Dennis Patrick to House Energy and Commerce Committee Chairman John Dingell.

that, contrary to the FCC's and many broadcasters' contention, the elimination of the Fairness Doctrine did not increase speech on these issues. Moreover, but for the fact that it still applies to ballot issues, many stations would not have carried opposing viewpoints. In other words, many stations only carry both sides of an issue when they are required to do so. See also, Testimony of Wendy Collins Perdue, 1989 Senate Communications Subcommittee Hearings at 80–81.

Opponents of the Doctrine have seized upon the "findings" in the FCC's 1985 Fairness Doctrine Report to conclude that the Doctrine inhibits speech. But the FCC completely ignored the well-documented use of the Fairness Doctrine by countless individuals and groups seeking to air their views.[23] The failure of the FCC to appreciate that formal and informal use of the Fairness Doctrine has created countless opportunities for expression, as well as its failure to take into account the speech added by uncontested compliance with the Doctrine, totally undermines the FCC's conclusion that the Fairness Doctrine "overall lessens the flow of diverse viewpoints." 1985 Fairness Doctrine Report, 102 FCC 2d at 171.

Chairman Fowler testified at the March 1987 hearing that the FCC received approximately 75 "anecdotes" demonstrating how the Fairness Doctrine has been used to "shake down" and intimidate broadcasters. These anecdotes cited by the FCC in the 1985 Fairness Doctrine Report include a number of examples where public interest groups had described situations where they had succeeded in obtaining airtime to present an opposing viewpoint, without involving the FCC. In other words, many of these groups were praising both the Fairness Doctrine and the broadcasters, citing examples where the Doctrine worked. It is clear from the hearing record that the FCC's interpretation of these anecdotes is erroneous. Just because a group obtained airtime without FCC involvement does not mean that the broadcaster was intimidated and threatened by a member of the public. In fact, it shows broadcasters understood the law and complied voluntarily.

Chairman Fowler's conclusion is directly contradicted by a study conducted by Anna Goldoff, Associate Professor, John Jay College, New York. Professor Goldoff interviewed general managers at 6 television and 16 radio stations in New York City. Only 2 of the 22 stations indicated that the Fairness Doctrine had a chilling effect and only 3 of the stations indicated that elimination of the Doctrine would increase speech on controversial issues. See, Testimony of Professor Anna Goldoff. 1989 Senate Communications Subcommittee Hearings at 51–53.[24]

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[23] See *e.g.*, Comments of Media Access Project and Telecommunications Research and Action Center (in Gen. Docket 84–282), filed September 6, 1984; Comments of Henry Geller and Donna Lambert (in Gen. Docket 84–282), filed September 6, 1984; Comments of the Office of Communication of the United Church of Christ, The Unitarian Universalist Association, The Communication Commission of the National Council of Churches of Christ in the U.S.A., Everett C. Parker and Al Swift, (in Gen. Docket 84–282), filed September 6, 1984. See also, Letter to Chairman Mark Fowler from Safe Energy Communications Council, dated March 4, 1987 (describing case histories involving stations in over 14 States showing how "smoothly the Fairness Doctrine operates in practice").

[24] The study also demonstrated that stations expended a minimal amount of time and money in implementing the Fairness Doctrine. Id. at 51–53.

Chairman Fowler conceded at the March 1987 hearing that his 75 examples spanned over 20 years, from the "1960's through to our most recent case * * * in either '84 or '85". Moreover, many of the examples occurred prior to 1979, were raised before the FCC, and were found unpersuasive by the FCC in its positive conclusions about the Doctrine in 1974, 1976 on reconsideration, and again in 1979. See, 1974 Fairness Report, 48 FCC 2d 1 (1974), recon. denied, 58 FCC 2d 691 (1976) aff'd sub nom. *National Citizens Committee for Broadcasting* v. *FCC*, 567 F.2d 1095 (D.C. Cir. 1977), cert. denied, 436 U.S. 926 (1978); Fairness Doctrine Inquiry, 74 FCC 2d at 168–177.

In reality, the FCC's portrayal of the harm from the Fairness Doctrine is grossly distorted. Thomas Goodgame, President, Television Station Group, Westinghouse Broadcasting Company (a 34 year veteran of the broadcast business, including 17 years as a TV station general manager for Group W and other broadcast groups, 16 years as a sales manager and one year as general manager of KATV in Little Rock, Arkansas, and one year as Vice President and General Manager of KTUL, Tulsa, Oklahoma), testified at the 1987 Senate Communications Subcommittee hearing that Group W, one of the major holders of broadcast stations, has never had any problems complying with its fairness obligations. In fact, Group W has had a policy "that basically followed the Fairness Doctrine since 1947" and that policy does not still its editorial voice.

Further, as set forth in the Reply Comments of Media Access Project (MAP) and TRAC (filed November 8, 1984 in Gen. Docket No. 84–282), of the 45 examples set forth by the National Association of Broadcasters (NAB) in the FCC's 1984 proceeding on the Fairness Doctrine,[25] only 11 are new. MAP reply comments at 27. As set forth by MAP:

1. Several of the NAB's cases are merely write ups of previously decided cases.

2. NAB example numbers 18–24 are excerpts of testimony presented in the 1983–84 Senate Freedom of Expression Hearings in support of S. 1917, a Fairness Doctrine repeal bill. The Senate Commerce Committee resoundly defeated that bill, obviously unpersuaded by these examples.

3. NAB examples 25–28 and 36–39 were statements made during the 1975 Senate hearings on the Fairness Doctrine repeal, which was also rejected.

4. Examples 29 and 30 were presented to a House Subcommittee in 1968, 16 years ago and before *Red Lion.*

5. Example 34 is from a Statement to another Senate Committee supporting a constitutional amendment repealing the Fairness Doctrine—which was also rejected.

6. Examples 40–45 are excerpts taken out of context from published books and articles.

7. Three of the examples (17, 20, and 24) refer to the same case.

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[25] See Comments of the National Association of Broadcasters (in General Docket No. 84-282), filed September 6, 1984 cited by the FCC in its 1985 Fairness Doctrine Report, 102 FCC 2d at 162–179.

8. Four examples (5, 14, 15, and 30) refer to the personal attack rule, not the overall Fairness Doctrine.

9. Eleven examples are mere policy statements not specific incidents, stories, or events. (See 8, 22, 32, 34, 35, 36, 37, 38, 39, 44, and 45.)

10. A large number of the examples are recitations of so-called costs incurred in complying with the Fairness Doctrine (see 2, 3, 7, 12, 13, 15, 16, 17, 18, 19, 21, 22, 23, 24, and 25). Many of these complaints require no more than the cost of a stamp or a phone call to resolve. Moreover, the FCC has only requested that licensees respond to a handful of complaints; thus very few licensees actually incur any significant legal fees or other costs.

11. Finally, many of the NAB's examples are so vague as to render them meaningless. For example, examples 4 and 6 are anonymous claims that consist of nothing more than two licensees who state they routinely avoid controversial issues. These kinds of self-serving statements, devoid of any specificity, are insufficient for the FCC to use as the basis for any findings, much less repeal of the Fairness Doctrine.

The Committee is not taking the position that the Fairness Doctrine does not impose a burden on licensees. Rather, the Committee believes that the burden is both necessary and minimal and that the Fairness Doctrine is the least intrusive means of achieving the goal of robust debate on issues of public importance. As the Court stated in *Red Lion*, "[it] is the right of the viewers and listeners, not the right of the broadcasters which is paramount." 395 U.S. at 390. While the Communications Act limits the rights of the viewers and listeners by excluding speakers from the airwaves, it mitigates this damage by enhancing speech through the Fairness Doctrine.

The FCC's attempt to establish a "chilling effect" is flawed. The Supreme Court in *Red Lion* found that the risk of chill was speculative. *Red Lion*, 395 U.S. at 367. Fifteen years ago, in an inquiry very similar to that recently undertaken, the FCC examined the issue of whether or not the Fairness Doctrine reduced the amount and quality of coverage of controversial issues of public importance. After two years of study, consuming thousands of staff hours, in which the FCC reviewed claims offered or very similar to those offered in the FCC's recent proceeding, the FCC found "no credible evidence of a chilling effect." 1974 Fairness Report, 48 FCC 2d at 8.

Similarly, in 1979, the FCC completed yet another review of the Fairness Doctrine. See, Report and Order, (Fairness Doctrine) 74 FCC 2d 163 (1979). In that proceeding, the FCC analyzed various proposals concerning the application of the Doctrine by licensees. In rejecting the proposals to alter the application of the Doctrine, the FCC stated:

> Over the course of thirty years this Commission has obtained valuable experience with respect to the actual efficacy and enforcement of the Fairness Doctrine. * * * After careful consideration, we conclude that the existing scheme is based on sound policy, even if the established case-by-case analysis has been shown to present some administrative difficulties. * * * [t]he foundation stone of the

> American system of broadcasting is the right of the public to be informed rather than the right on the part of any individual member of the public to broadcast his own particular views on any matter. * * *

Id. at 169.

Despite these prior findings, the FCC in its 1985 Fairness Doctrine Report purported to find evidence that the Fairness Doctrine chilled broadcast speech. The FCC's evidence, however, consists solely of broadcasters' accounts of the effects of the Fairness Doctrine. There was no detailed and well-documented evidence presented, only isolated anecdotes. As indicated, the FCC also failed to discuss realistically, much less weigh, evidence in the record demonstrating that various individuals and groups have used the Fairness Doctrine to obtain broadcast time. Perhaps most importantly, however, the FCC failed to discuss why the allegations of broadcasters were any more persuasive in this proceeding then they were when they were presented to the Supreme Court in *Red Lion* and to the FCC in the 1970's. Further, as the Court recognized in *Red Lion,* but the Commission ignored, "if licensees should suddenly prove timorous, the FCC is not powerless to insist that they give adequate and fair attention to public issues." 395 U.S. at 393. After all, the Fairness Doctrine contains an affirmative obligation on the part of broadcasting to air matters of public importance.

If the Fairness Doctrine had actually chilled speech, one would assume that there would be an increase in the discussion of controversial issues in the months since the Doctrine was eliminated by the FCC in 1987. This has not been the case. In fact, the discussion of controversial issues appears to have decreased. A recent article in "Broadcasting" stated that the amount of time devoted to station editorials has recently declined. See, "Broadcasting," February 6, 1989 at 45. In addition, recent polls of TV stations indicate that stations are cutting back on their news staffs. See, Stone, Vernon, "News Staffs Unchanged in Radio, Smaller in TV," "Communicator," March, 1989 at 14. In 1989, television news staffs decreased by an average of 1 full-time staff person from 1987. Id. Finally, a recent study compared the amounts of issue-oriented public affairs programming between the hours of 6 a.m. and 12 midnight on 217 television stations. It found such programming decreased by 51 percent between 1979 and 1988. Donahue, Jim, "Shortchanging the Viewers: Broadcaster' Neglect of the Public Interest Programming," "1989 Essential Information."

Vindication of competing First Amendment interests in the broadcasting realm by the Fairness Doctrine is achieved with minimal instrusion into the editorial discretion of broadcasters, since the FCC and the courts have carefully circumscribed the scope of the Doctrine in order to minimize any intrusion. Before the FCC will even ask a broadcaster to comment upon a Fariness Doctrine complaint, the complainant must present "detailed and specific evidence," *Alan C. Phelps,* 21 FCC 2d 12, 13 (1969), on a variety of issues [26] sufficient to establish a prima facie violation. This prima

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[26] As the FCC stated in its Fairness Primer, the complainant must present specific facts to show: (1) the particular station involved; (2) the particular issue of a controversial nature dis-

Continued

facie evidence requirement is carefully designed to "weed out those complaints that would burden broadcasters without sufficient likelihood that a countervailing benefit will be gained." *American Security Council* v. *FCC,* 607 F.2d 438, 452 (D.C. Cir. 1979) (en banc). A broadcaster's judgment must simply be in good faith and reasonable in order to be upheld. As one journalist put it, the FCC will question a broadcaster only when the "station's position is so 'off the wall' that no reasonable person could accept it." Ford Rowen, "Broadcast Fairness" at 65.

Only a tiny portion of complaints result in any FCC action whatsoever. For example, as set forth above, in 1986, the FCC requested only 6 broadcasters to respond to Fairness Doctrine and political broadcasting complaints even though the FCC received an estimated 5,509 complaints in all. See, letter to Senator Inouye, from Mark S. Fowler, Chairman, FCC, dated March 20, 1987. In cases where the FCC has determined that a licensee has not met its Fairness Doctrine obligations, broadcasters were simply advised to provide additional programming. *See, American Security Council Education Foundation* v. *FCC,* 607 F.2d at 447; In Re Applicability of Fairness Doctrine in Handling of Controversial Issues of Public Importance, 40 FCC 598, 599 (1964). The FCC's deference to broadcasters has been reinforced by the courts, which have carefully portected the rights of broadcasters and have scrutinized the FCC's decisions more closely than those of other regulatory agencies. See e.g., *Strauss Communications, Inc.* v. *FCC,* 530 F.2d 1001, 1011 (D.C. Cir. 1976); Polsby, Candidate Access To The Air: The Uncertain Future of Broadcaster Discretion, 1981 Sup. Ct. Rev. 223, 1984 (1981).

Finally, arguments as to the "chilling effect", such as those found in the FCC's 1985 Fairness Doctrine Report, erroneously assume that this type of "finding" would suffice to establish a First Amendment violation. However, a "chill" can only arise from an unwillingness on the part of broadcasters to air both sides of an issue, an unwillingness to act as a public trustee to vindicate the substantial government interest in the balance of information reaching the public. In fact, broadcasters need only fear the consequences of decisions to present only one side of an issue in their overall programming. A broadcaster who acts according to the standards of his or her profession, on the other hand, has nothing to fear from the Fairness Doctrine, since it is only applied in the most egregious cases of imbalance. In the only recent FCC decision to arrive at a finding of a Fairness Doctrine violation, the FCC found that the licensee broadcasted a total of 187 minutes on a controversial issue of public importance while airing opposing viewpoints for only 22 minutes. See, Syracuse Peace Council, 99 FCC 2d 1389, 1400 (1984), on recon., 59 RR 2d 179 (1985).

The "chill" argument is thus an attempt to clothe in First Amendment language a refusal on the part of broadcasters to fulfill the commitments they gave in return for the grant of a valuable public privilege. As a matter of First Amendment jurispru-

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cussed over the air; (3) the date and time when the program was carried; (4) the basis for the claim that the station has presented only one side of the questions; and (5) whether the station had afforded or has plans to afford, and opportunity for the presentation of contrasting viewpoints. "Fairness Primer," 40 FCC at 600.

dence, however, Government may legitimately seek such a quid pro quo for grant of public privileges. This recognition is not limited to the context of broadcasting, see, n.26, supra, and accompanying text, but extends to other activities protected by the First Amendment. In *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the Supreme Court struck down as violative of the First Amendment limitations on campaign expenditures in the Federal Election Commission Act. However, it upheld those same limitations on expenditures of candidates who accepted public financing of their campaigns. See, 424 U.S. at 85–104; see also, *Regan* v. *Taxation With Representation of Washington*, 461 U.S. 540 (1983) (holding that government may condition tax-exempt status on absence of lobbying activities).

Lack of knowledge of the meaning of the Fairness Doctrine and how it is applied by the FCC accounts for a great deal of broadcasters' "fear" of the Fairness Doctrine and their belief that it chills their First Amendment rights. The Fairness Doctrine is largely a self-enforcing rule which rarely requires significant time or resources from either the FCC or licensees. As demonstrated above, the Fairness Doctrine, as enforced by the FCC, only requires licensees to respond to a minute percentage of the complaints filed.

In the late 1970's the FCC realizing that broadcasters often misunderstand the Fairness Doctrine, had the staff prepare a Primer. This was virtually completed in 1981, but the FCC has never released it to the public. To foster greater certainty, the Committee included this 1981 version of the Primer as Appendix 2 of its 1987 Report (100–34). The Primer describes the Fairness Doctrine, its purpose and its limitations, and defines controversial issues, and broadcasters' obligations. In addition, the Primer provides specific examples of when the doctrine should be applied and more importantly, when it does not apply. Because it is a 1981 draft, the Primer does not contain FCC actions since then, particularly the *NCPAC* case. (*National Conservative Political Action Committee*, 51 RR 2d 233 (1982)).

If broadcasters had access to the Primer, many of their misconceptions and fears would be resolved. The Committee believes that the Primer or some similar form of guidance should be updated and provided promptly to broadcasters and the general public.

CONCLUSION

The debate on the Fairness Doctrine is, at its roots, a debate over government allocation of a public resource, the spectrum. Under the current American system of broadcasting, the FCC has decided to allocate a relatively limited amount of this spectrum and permit each licensee to control the content of what is transmitted over this spectrum. To balance the limited number of opportunities the public has to become licensees and to provide the public with a greater number of voices, the FCC has required these broadcast licensees to act as public trustees. The Fairness Doctrine is a fundamental requirement of this public trust. Without it, the public trust would mean little.

Throughout this Report, the Committee has demonstrated that the underpinnings of the Fairness Doctrine remain strong. Scarcity of the spectrum, the existence of few alternatives to broadcast li-

censes, the effectiveness of the Doctrine, and the de minimus burden on broadcasters all are as sound rationales as when the Doctrine was adopted and when it was upheld by the Supreme Court. It is for these reasons that the Committee supports and needs to ensure the continuation of the Fairness Doctrine, which has proven over its history that it enhances speech and the provision of information to the public. By taking this action, the Committee does not intend to deprive the FCC of the discretion to assist in the evolution of the policies and to be faithful to the First Amendment rights of both the broadcasters and the American public.

With the FCC's elimination of many of the public trust requirements for broadcasters, there has been a tremendous turnover in the ownership of broadcast stations. In a sense, the risk of having a license taken away by the FCC has been significantly reduced, and consequently, these licenses are being treated somewhat like other commodities. As a result of this great change in ownership, the Committee is concerned that there may be a lessening of the commitment to serve the public.

The incentives of broadcasters have changed greatly. As a result, the news and information that broadcasters disperse is decreasing in both quality and quantity. In a July 2, 1989 story in the New York Times, Dave Marash, a TV anchorman, stated:

> The Constitution offers First Amendment protection to journalists because they are expected to play a crucial role in our democracy. But today's television local news covers little more than the horse-race aspects of the democratic process and keeps itself woefuly ignorant of the complex government that process produces. Equally negligent, our local news shows fail to probe the private, nongovernmental systems that shape our daily lives.
>
> No wonder television viewers in New York, Washington and elsewhere, seem increasingly alienated from democracy as it is practiced today. Who would want to participate as a candidate or even as a voter in a system so harsh and simple-minded as the "politics" put forth on local newscasts?

This is a troubling trend. The Committee does not agree with the former Chairman of the FCC, Mr. Fowler, that broadcast stations should be treated like toasters. While the Committee has permitted many of the deregulatory measures for the broadcast service, the Committee continues to believe strongly that whatever increased competition there may be, the broadcast marketplace does not relieve broadcasters of their public trust obligations. The Fairness Doctrine is at the heart of these obligations. The Doctrine takes on added importance in this new broadcast environment. For all of the reasons provided in this Report, the Committee believes the Fairness Doctrine must be reinstated and S. 577 enacted.

Legislative History

S. 577 was introduced on March 15, 1989, by Senator Hollings, with Senators Inouye, Danforth, Ford, Exon, Gore, Rockefeller,

Bentsen, Kerry, Breaux, Bryan, Robb, Gorton, Lautenberg, Wirth, and Simon as co-sponsors, codifying what is commonly known as the Fairness Doctrine. It amends section 315(a) of the Communications Act of 1934 to require broadcast licensees to present discussion of conflicting views on issues of public importance. A hearing was held on this legislation on March 15, 1989, and four witnesses testified. On April 18, 1989, the Committee in open executive session considered S. 577 and ordered it reported favorably by voice vote, with Senators Packwood and Pressler requesting that they be recorded as voting against the legislation.

Prior to this Congress, three bills concerning the Fairness Doctrine were introduced during the Senate in the 100th Congress. S. 742 was introduced on March 15, 1987, by Senator Hollings, with Senators Inouye and Danforth as co-sponsors, codifying the Doctrine. A hearing was held on March 18, 1987, and S. 742 was reported to the full Senate on April 3, 1987. It passed the Senate on April 21, 1987, and the House on June 3, 1987. The President vetoed S. 742 on June 22, 1987.

S. 22, the First Amendment Clarification Act of 1987, introduced on January 5, 1987, by former Senator Proxmire, sought to repeal the Fairness Doctrine. The same bill had been introduced by Senator Proxmire in every Congress since 1975. The Committee took no action on S. 22 or any of its predecessors.

On March 24, 1987, Senator Packwood introduced S. 827, the Freedom of Expression Act of 1987, legislation to repeal section 315 and section 312(a)(7) of the Communications Act. No action was taken on this bill. This legislation was similar to legislation introduced by Senator Packwood in the 98th Congress (S. 1917) and in the 99th Congress (S. 1038). Hearings had been held on Senator Packwood's proposals on September 28 and 30 and November 19, 1982, and on January 30 and February 1 and 8, 1984. An amended version of S. 1917 was considered and rejected by the Commerce Committe in executive session on June 13, 1984, by a vote of 11–6. No action was taken on S. 1038.

Summary of Major Provisions

The reported bill codifies the Fairness Doctrine, by obligating broadcast licensees (1) to cover issues of public importance and (2) to do so in a balanced fashion. The bill further provides that the enforcement and application of the Fairness Doctrine shall be consistent with the rules and policies in effect on January 1, 1987. Finally, the bill prohibits the imposition of criminal penalties for the violation of the Fairness Doctrine.

Estimated Costs

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 21, 1989.

Hon. ERNEST F. HOLLINGS,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 577, the Fairness in Broadcasting Act of 1989, as ordered reported by the Senate Committee on Commerce, Science, and Transportation, April 18, 1989. We expect that enactment of the bill would cost the federal government about $100,000 annually.

S. 577 would codify the fairness doctrine into the Communications Act of 1934 to ensure that broadcasters afford reasonable opportunity for the discussion of conflicting views on issues of public importance. The bill specifies that enforcement and application of this requirement would be consistent with the rules and policies of the Federal Communications Commission (FCC) in effect on January 1, 1987.

Based on information from the FCC, CBO estimates that enforcement and administration of the doctrine would result in additional costs of about $100,000 annually. Most of this cost would stem from the administration of complaints made to the FCC in response to alleged fairness doctrine violations.

No costs would be incurred by state or local governments as a result of enactment of this bill.

If you wish further details on this estimate, we will be pleased to provide them. The CBO contact is Douglas Criscitello, who can be reached at 226–2860.

Sincerely,

ROBERT D. REISCHAUER
Director.

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported.

The bill, as reported, will clarify the FCC's existing authority to ensure that broadcast licensees provide information on important public issues and that the information is presented fairly. It thus will have no effect on the number of individuals regulated or the personal privacy of such persons. The costs of compliance and the amount of paperwork should be consistent with current levels.

SECTION-BY-SECTION ANALYSIS

Section 1. Short Title

This Act may be cited as the "Fairness in Broadcasting Act of 1989."

Section 2. Findings

Under this section, the Congress makes findings that can be summarized as follows:

1. The electromagnetic spectrum remains a scarce and valuable public resource and substantially more people want to broadcast than there are frequencies to allocate.

2. The Fairness Doctrine has been used over its almost 40 year history to permit speakers other than broadcast licensees to air their views, to enable the public to receive additional and conflicting information on matters of import, and thus, to enhance the First Amendment's dictate of freedom of speech.

3. The Fairness Doctrine strikes a reasonable balance among the First Amendment rights of the public broadcast licensees, and speakers other than owners of broadcast stations.

4. The Fairness Doctrine does not have a chilling effect on broadcasters.

Section 3. Amendment to the Communications Act of 1934

This section amends section 315 of the Communications Act by inserting a new subsection (a). Subsection (a)(1) contains the Fairness Doctrine. It obligates broadcast licensees (1) to cover issues of public importance and (2) to do so in a balanced fashion.

The first part of the Doctrine is an affirmative obligation on broadcast licensees to provide adequate coverage of certain local and national issues of vital or critical importance to a community or nation. See *Representative Patsy Mink* v. *WHAR,* 59 FCC 2d 987 (1976). The FCC has not frequently invoked this so-called "first half" of the Doctrine. In the event that, in the future, the FCC should be concerned that there is some diminution in broadcasters' coverage of issues, the FCC should more vigorously apply this provision "to insist that they [broadcast licensees] give adequate and fair attention to public issues." *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 393 (1969).

The second part of the Doctrine contains the obligation that broadcast licensees air conflicting views on matters of public importance. Under this provision, a licensee is required to provide a forum for all opposing views on a program or series of programs when one side of a controversial issue is presented. A licensee, however, is not required to provide "equal time" to the opposing viewpoints. Licensees are only expected to make a provision for the opposing views in their overall programming. They are expected to present the issues fairly. "[T]here is no requirement that any precisely equal balance of views be achieved, and that all matters concerning the particular opposing views be presented and the appropriate spokesman and format for their presentation are left to the licensee's discretion subject only to a standard of reasonableness and good faith." Fairness Report, 48 FCC 2d at 18 (1974).

New subsection (a)(2) of section 315 provides that the enforcement and application of the Fairness Doctrine shall be consistent with the rules and policies in effect on January 1, 1987. This provision is designed to ensure that the rationale underlying the key rules and policies of the Fairness Doctrine continue to be addressed. The Committee wants to ensure the retention of the core policies embodied in the personal attack rule (47 CFR 73.1920), the political editorializing rule (47 CFR 73.1930), and those dealing with elections and ballot issues. As to the latter, it is vital that Fairness Doctrine issues concerning candidates or ballot proposi-

tions be resolved expeditiously within the campaign period. The Committee intends that the present practice of issuing timely rulings be retained. As to substance, the core policies set out in In re *Nicholas Zapple,* 23 FCC 2d 707 (1970), and *Cullman Broadcasting Co.,* 40 FCC 576 (1963), must also be maintained if the public is to be reasonably and fairly informed in the crucial area of the ballot. A democracy depends on an informed electorate, and broadcasting today plays the key role today in providing such information. By incorporating this subsection, the Committee is ensuring that core policies implementing the Fairness Doctrine be preserved.

The second part of new subsection (a)(2) prohibits the imposition of criminal penalties for the violation of the Fairness Doctrine. Section 501 of the Communications Act permits the imposition of criminal penalties (fines) and imprisonment for up to one year for willful and knowing violations of the Act. The remedy for a Fairness Doctrine violation has been to require the licensee to air an opposing viewpoint. In cases where there are repeated violations of the Fairness Doctrine, the FCC can consider those violations in determining whether to renew the license. The Committee does not intend for the FCC to impose criminal penalties for violations of the Fairness Doctrine.

Section 4. Effective Date

This section states that the legislation shall take effect upon the date of enactment.

Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

The Communications Act of 1934

Section 315 of that Act

FACILITIES FOR CANDIDATES FOR PUBLIC OFFICE

Sec. 315. *(a)(1) A broadcast licensee shall afford reasonable opportunity for the discussion of conflicting views on issues of public importance.*

(2) The enforcement and application of the requirement imposed by this subsection shall be consistent with the rules and policies of the Commission in effect on January 1, 1987. Such rules and policies shall not be construed to authorize the application of any criminal sanction pursuant to section 501 of this Act.

[(a)**]** *(b)* If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow

the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

[(b)] *(c)* The changes made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed—

(1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and

(2) at any time, the changes made for comparable use of such station by other users thereof.

[(c)] *(d)* For purposes of this section—

(1) the term "broadcasting station" includes a community antenna television system; and

(2) the terms "licensee" and "station licensee" when used with respect to a community antenna television system mean the operator of such system.

[(d)] *(e)* The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

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